THE UNDER SECRETARY OF LABOR
WASHINGTON, D. C.
20210

In the Matter of **JOHN A.** SCHMIDTKE Complainant	)	Case No. 79-CETA-235

FINAL DECISION AND ORDER

Statement of the Case

This case arose under the Comprehensive Employment and Training Act of 1973, as amended (CETA or Act), 29 U.S.C. 801 et seq., and the regulations, at 20 and 29 CFR, issued thereunder and in effect at the pertinent times (Regulations).

The Complainant, Mr. John A. Schmidtke, contends that he is entitled to the difference between what he earned from March 7 through December 31, 1977, in his CETA-participant position as an "Assistant Volunteer Coordinator" in the employ of the Brown County Department of Social Services. (BCDSS) and the pay of a "Social Worker I" employed by the BCDSS during that period. The BCDSS is an agency of Brown County, Wisconsin, the subgrantee in this matter. Wisconsin Balance of State (WBOS), an agency of the State government, is the prime sponsor.

On August 13, 1979, a U.S. Department of Labor (USDOL) Grant Officer issued a "Final Determination" affirming the prime sponsor's denial of M-r. Schmidt&e's claim. On August 20, 1979, Mr. Schmidtke filed a request for a hearing before a USDOL Administrative Law Judge (ALJ). On February 5, 1980, the ALJ issued a "Notice Scheduling Hearing and Prehearing Order."

The service sheet attached to that notice and order indicates that no copy of it was sent to either Brown County or the BCDSS. Pursuant to that notice, an ALJ hearing was held on April 18, 1980. However, the record of that hearing indicates that neither Brown County nor the BCDSS participated in it.

On September 17, 1980, the ALJ issued a "Decision and Order" in which he reversed the Grant Officer, determined that Mr. Schmidtke was entitled to the back pay he sought plus interest, and held the BCDSS and WBOS jointly and severally liable for it. A copy of that decision was sent to, inter alia, the Green Bay/Brown County Joint CETA Administration. Brown County thereupon asked the Secretary of Labor to review the ALJ decision. Brown County contended that the ALJ, in holding the BCDSS liable, exceeded his authority in that, I) under the Regulations in effect in 1977, only WBOS, the prime sponsor, could be held by the USDOL to be liable; and, 2) in any event, neither the BCDSS nor Brown County had been given notice of the hearing or accorded an opportunity to participate in it. On October 17, 1980, the Secretary of Labor issued an order asserting jurisdiction, and vacating and staying the ALJ's decision in the matter pending final determination. On October 21, 1980, a "Notice of Briefing Schedule" was issued. A copy of it was sent to, inter alia, the Office of the Corporation Counsel of Brown County.

Findings of Fact and Conclusions of Law

Brown County's first ground for its exception to the ALJ's determination that the BCDSS was liable for payment of back pay is rejected. As indicated in the Secretary's decision in Allen Gioielli, Case No. 79-CETA-148 (decided January 18, 1982), entities other than the prime sponsor may, under the Regulations in effect during the time period in question in this case, be held liable, along with the prime sponsor, for back pay due a former CETA participant.

The county's second ground for that exception is correct in principle. Liability may not attach to a party that has been denied its "day in court." The ALJ's assertion at the hearing that Brown County's and the BCDSS's interests were adequately represented by the prime sponsor, WBOS, through the latter's participation in the ALJ proceeding ignores the facts that 1) the interests of a prime sponsor and a subrecipient in a backpay proceeding are not necessarily identical, and, more important, that 2) Brown County and the BCDSS were entitled to decide for themse'fves how they would be represented.

The Regulatory section on which Mr. Schmidtke relies, 29 CFR 96.34(a)(3), as in effect in 1977, provides. that

> "[e]ach [CETA public service employment program] participant shall be paid at a rate no less than the prevailing rate of pay for persons employed in similar public occupations by the same employer . . ." (emphasis supplied).

The ALJ's decision refutes a number of errors in the prime sponsor's and Grant Officer's decisions (e.g., their emphasis on

Mr. Schmidtke's lack of the kind of bachelor's degree, in sociology or social work, required for appointment without experience to a Social Worker I position).

The evidentiary record before the ALJ establishes certain key facts: Some 70 percent of the time, Mr. Schmidtke, while an Assistant Volunteer Coordinator, performed case-management duties which were mechanically comparable to those of a Social Worker I; 30 percent of the time he performed duties (transportation, and miscellaneous, coordination of volunteers) which (a) were not similar to the actual duties of Social Worker I's employed by the BCDSS, and (b) could only with the aid of verbal "sleight of hand" be construed as fitting the State and county position descriptions of a Social Worker I's duties.

Turning to the question of mechanical comparability, I note as a commonplace of the world of work that employees performing mechanically comparable duties are often differentiated in rank and pay on the basis of differences in the average complexity of the tasks assigned to them. The fact, emphasized by the ALJ, that Mr.' Schmidtke, with a caseload twice as large as the Social Worker I's, probably worked just as hard in the performance of his case-management duties does not alter the result. There is no reason to assume that a more egalitarian wage-determination principle was contemplated in the adoption of 29 CFR 96.34(a)(3).

In sum, in the Schmidtke case I am asked to rule upon the alleged similarity of the positions of Assistant Volunteer Coordinator and Social Worker I. The first-named position involves duties which are mechanically comparable to the second only 70 percent of the time; and less complexity is typically involved in the performance of those duties in the first-named job than in the second. I am not persuaded that mechanical comparability of the two jobs' duties only 70 percent of the time is sufficient to render the two jobs "similar" within the meaning of 29 CFR 96.34(a)(3). My opinion is reinforced by the fact, conceded by Mr. Schmidtke, that the cases assigned to Social Worker I's are typically more complex than are those which were assigned to him. Also rejected is the view that similarities between two jobs with respect to the skill, knowledge, affects and responsibilities needed to perform them are sufficient to render such positions similar within the meaning of 20 CFR 96.34(a)(3).

Order

Accordingly, it Ordered that the back-pay claim herein of John A. Schmidtke IS DENIED.

Under Secretary of Labor

Dated: MAY 7 1985
Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: JOHN A. SCHMIDTKE

Case No.: 79-CETA-235

Document: Final Decision and Order

This is to certify that a copy of the above-referenced document was sent to the following parties on May 7, 1985.

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